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IN THE UNITED STATES DISTRICT COURT FOR THE
 NORTHERN DISTRICT OF CALIFORNIA
 SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA

Plaintiff,

v.

CHARLES CATHCART *et al.*

Defendants.

Civil No. 03:07-cv-4762-PJH

UNITED STATES'S MOTION FOR AN
 ENLARGEMENT OF TIME IN WHICH
 TO SERVE CHARLES CATHCART
 WITH THE COMPLAINT AND
 PERMISSION TO SERVE BY
 PUBLICATION

Notice: No Hearing Requested

Pursuant to Rule 4(m) of the Federal Rules of Civil Procedure and Local Rule 6-3, the United States respectfully requests that the Court grant it an additional sixty days in which to serve defendant Charles Cathcart with the complaint. Thus, the United States would be required

1 to serve Charles Cathcart sixty days from January 15, 2008, which is March 17, 2008, the next
2 business day after the sixty-day extension expires. Discovery has not yet started in this case, and
3 extending the deadline by which to serve Cathcart will not alter the litigation schedule the parties
4 expect to propose to the Court at their initial scheduling conference on January 3, 2008.

5 The United States further requests that it be permitted to serve Cathcart through
6 publication by publishing the summons in a newspaper, based in or nearby to Santa Barbara,
7 California, where Cathcart is known to reside, in accordance with Rule 415.50 of the California
8 Rules of Civil Procedure.

9 **Background Facts**

10 The United States filed its complaint on September 17, 2007, seeking to enjoin Charles
11 Cathcart and his colleagues from promoting two abusive tax shelters.

12 The Complaint alleges that since 1997, Charles Cathcart has been the principal organizer
13 and promoter of two fraudulent tax schemes. Cathcart and the other defendants promote the 90%
14 Stock Loan program to customers with highly-valued, low-basis stock, and defendants promote
15 the ESOP-QRP program to customers who have sold qualified securities to Employee Stock
16 Ownership Plans (ESOP) and then reinvested the sale proceeds in qualified replacement property
17 (QRP) in stocks or floating rate note loans. Defendants promote these two programs as loans in
18 which customers' securities are transferred to defendants to provide collateral for a loan equal to
19 90% of the securities' value. Defendants falsely tell customers that (i) this transaction is a loan;
20 (ii) that customers who transfer their securities to defendants will incur no tax liability, because
21 the transfer is collateral for a loan and not a sale of the customers' securities; and (iii) that
22 defendants will help preserve the value of the customers' transferred securities through the use of
23 sophisticated hedging techniques, developed by Charles Cathcart. These transactions are actual
24 sales, disguised as transfers of collateral for purported loans, and these transactions are designed
25 so that a customer can avoid the payment of taxes otherwise incurred from the sale of their
26 securities. Specifically, it is estimated that the tax loss resulting from these programs is as much
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1 as \$234,567,700. Compl. ¶85. Indeed, Charles Cathcart has stated that over 1,700 individuals
2 participated in these programs and in transactions totaling more than \$1 billion. *Id.* ¶84.

3 On October 9, the United States sent each defendant a courtesy copy of the complaint, the
4 Court's management order, and a proposed stipulation for entry of final judgment for permanent
5 injunction. *See* Declaration of Allyson B. Baker, ¶3., Ex. A. Cathcart was sent and received
6 these documents at the address where he resided in October. *See id.* Cathcart, through counsel,
7 then sent a counter-offer to counsel for the United States, which included a request that the United
8 States not attempt to serve him with the complaint, pending consideration of his settlement
9 proposal. *See id.* ¶4. The United States rejected Cathcart's settlement proposal; counsel for the
10 United States has spoken with Cathcart's counsel about this rejection, as well. *See id.* ¶¶6-7.

11 Cathcart continues to willfully evade service. The United States has attempted to serve
12 Cathcart on a total of 24 different occasions at the address where he resided in September and
13 October (and at which he received the United States's proposed stipulation) and at the address
14 where he is known to currently reside. *See* Declaration of Andrew Jones, ¶2, Ex. B. Andrew
15 Jones, the process server hired by the United States, attempted to serve Cathcart at different
16 times of the day, including early morning, late morning, afternoon and evening hours. *See id.*
17 Jones also attempted to serve Cathcart on week days and weekends, including on weekend
18 mornings and afternoons, when it is highly probable that Cathcart would be home. *See id.* On
19 almost every occasion when Jones attempted to serve Cathcart, there were lights on in Cathcart's
20 home, noise was coming from inside his house, and there were cars in the house's driveway. *See*
21 *id.* Either Cathcart or his wife, Evelyn, were likely home on each of these occasions;
22 nevertheless, they always refused to answer the door when Jones approached the home, knocked
23 on the door, and attempted service. *See id.*

24 During December 18 and 20 telephone conversations with counsel for the United States,
25 Cathcart's attorney, Eric Webb, acknowledged that Cathcart has not yet been served. *See* Baker
26 Decl. ¶¶7-8. Webb told counsel for the United States that Cathcart would not authorize him to
27 accept service of the complaint and that Webb does not know whether Cathcart will authorize
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1 waiver of service of summons. *See id.* ¶7. Webb also claimed during both telephone
 2 conversations that he does not know his client's home address. *See id.* ¶¶7-8. Webb further
 3 indicated that he expects that his client will voluntarily appear in the case in the middle of
 4 January. *See id.* ¶8. However, the 120-day time for serving Cathcart since filing the complaint
 5 on September 17, 2007 lapses on January 15, 2008, which is the middle of January, making it
 6 possible –if not likely – that Cathcart's strategy is to evade service and then seek dismissal from
 7 the litigation.

8 Because of Cathcart's persistent refusal to accept service at the address where he is known
 9 to reside, the United States respectfully requests an enlargement of time in which to serve the
 10 complaint, and for permission to serve Cathcart by publication.

11 **Relevant Law**

12 **A. The United States Has Shown Good Cause for Obtaining an Enlargement of Time In** 13 **Which to Serve Cathcart**

14 A district court may grant an extension for a party to serve a complaint for good cause
 15 shown. *See Fed. R. Civ. P. 4(m)*. Good cause is established when a plaintiff shows that “(a) the
 16 party to be served personally received actual notice of the lawsuit; (b) the defendant would suffer
 17 no prejudice; and (c) plaintiff would be severely prejudiced if his complaint were dismissed.”
 18 *Boudette v. Barnette*, 923 F.2d 754, 756 (9th Cir.1991).

19 The United States has clearly made this showing of good cause.¹ Enlarging the time for
 20 service will not prejudice Cathcart. As discussed above, he already has notice of the litigation, a
 21 copy of the complaint, and he is willfully evading service. However, if the United States's
 22 request for an enlargement of time is not granted, it will suffer substantial prejudice. Cathcart
 23 was the principal organizer and promoter of the two abusive tax shelters, alleged in the complaint,
 24 and thus, the United States cannot prosecute its case if Cathcart is dismissed from the litigation.

26 ¹ Moreover, a district court has broad discretion to enlarge the time for service, even
 27 in the absence of good cause. *Mann v. Am. Airlines*, 324 F.3d 1088, 1090 (9th Cir. 2003).

1 *See* Baker Decl. ¶9. In addition, because the estimated damage from defendants' abusive tax
2 shelters runs into the hundreds of millions of dollars, it is necessary to halt defendants' unlawful
3 conduct as quickly as possible. Moreover, there is little reason to think that Cathcart would not
4 continue to willfully evade service in any subsequent suit filed against him.

5 **B. Service By Publication Is Appropriate**

6 The United States has met all of the requirements for effecting service by publication.
7 The Federal Rules of Civil Procedure provide that service upon an individual "maybe effected in
8 any judicial district of the United States pursuant to the law of the state in which the district court
9 is located, or in which the service is effected, for the service of summons upon the defendant in an
10 action brought in the courts of general jurisdiction of the State." Fed. R. Civ. P. 4(e)(q).
11 California's Code of Civil Procedure, in turn, provides that "a summons may be served by
12 publication if upon affidavit it appears to the satisfaction of the court in which the action is
13 pending that the party to be served cannot with reasonable diligence be served in another manner
14 specified . . . and that . . . [a] cause of action exists against the party upon whom service is to be
15 made." Cal. Civ. P. Code § 415.50.

16 Cathcart's persistent refusal to accept service necessitates serving him through
17 publication. The United States has tried, with reasonable diligence, to serve Cathcart on 24
18 different occasions over the preceding months, and its efforts in this regard are well-documented.
19 *See* Jones Decl., Ex. A. Service by publication through a newspaper based in or nearby to Santa
20 Barbara, California, where Cathcart is known to reside currently, is necessary to ensure that the
21 United States is able to prosecute its case.

22 **CONCLUSION**

23 For all of the foregoing reasons, the United States respectfully requests that the Court
24 grant it an additional sixty days in which to serve defendant Charles Cathcart with the complaint,
25 extending the time for service until March 17, 2008. The United States further requests
26 permission to serve Cathcart by publication in accordance with the California Rules of Civil
27 Procedure.

December 21, 2007

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2007, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following:

Farley J. Neuman (fneuman@jgn.com)
Tom Prountzos (tprountzos@jgn.com)
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417 Montgomery Street, 10th Floor
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Attorneys for Defendant, Robert Nagy

I further certify that on December 21, 2007, service of the foregoing was made upon the following by depositing a copy in the United States mail, postage prepaid:

Yuri Debevc (*pro se*)
1483 Burningtree Road
Charleston, SC 29412

/s/ Allyson B. Baker
ALLYSON B. BAKER